

Civil, Entrepreneur and Bankruptcy

Affairs Chamber

Composed:

M. Sulkhaniashvili (**chairman, reporter**)

R. Nadariani, T. Todria

Case hearing form – without oral hearing

Cassation Applicant – M. O-shvili (Plaintiff)

Respondents' parties – JSC “National Centre of Tuberculosis and Lung Diseases”, JSC “Urology National Centre Named after Al. Tsulukidze”, LLC “Central University Clinic Named after Academician Nikoloz Kipshidze” (respondent)

The appealed judgment – Tbilisi Appellate Court Chamber of Civil Affairs 20.. year. ..June judgment

Cassation Applicant's Request – void the judgment and deliver the new one

Subject of the Dispute – pecuniary and non pecuniary damage reimbursement

Descriptive Part:

M. O-shvili submitted a lawsuit to Tbilisi Gldani-Nadzaladevi District Court against respondents JSC “National Centre of Tuberculosis and Lung Diseases”, JSC “Urology National Centre Named after Al. Tsulukidze”, LLC “Central University Clinic Named after Academician Nikoloz Kipshidze” and requested pecuniary and non pecuniary damage reimbursement in the amount of 100 000 GEL.

By the judgment of the Tbilisi Didube-Chugureti District Court of 27 May 2004 the lawsuit was not satisfied.

The judgment is appealed through the appellate complaint by M. O-shvili.

By Tbilisi Appellate Court Chamber of Civil Affairs .. June 20.. year judgment's appellate complaint of M. O-shvili was partly satisfied.

The Chamber established the following factual circumstances:

M. O-shvili received treatment from 11 September to 30 September 1991 at the Urology Department of Tbilisi State Medical University Clinic Named after Academician Nikoloz Kipshidze, where his left testicle was extracted.

On 13 March 1996 M. O-shvili applied to the First Department of Urology National Center. During hospitalization he was diagnosed with urinary pebbly disease and kidney colic. By clinical examinations at the right side urine passage infringement was discovered. With the purpose of restoring it the right side percutaneous nephrostomy and cystoscopy-biopsy was conducted. By morphologic examination epithelial moderate urinary bladder dysplasia was established, under mucus layer – inflammatory places.

On 5 April 1996 the patient was transferred to the physiatry and pulmonology scientific research institute at urology department, where he was provided with treatment until 28 May. Through complex research it was established that the patient had kidney cavernoso tuberculosis, urinary bladder tuberculosis, right side urethritis and prostate tuberculosis.

From 14 September to 26 September 1996 because of Hepatitis B M. O-shvili was placed under treatment at the infectious pathology centre.

On 2 December 1996 M. O-shvili was again placed at the first urology department of the urology scientific research centre. By X-ray examinations conducted by the clinic, urinary-reproductive organs tuberculosis was confirmed and the patient was assigned to continue anti-tuberculosis treatment. After treatment on 25 January 2000 the patient was discharged from the hospital in a satisfactory mode.

On 23 February 2000 M. O-shvili was repeatedly hospitalized at urology institute because of right side nephrostomy slip out, where he was provided conservative treatment and on 28 February 2000 the patient discharged from hospital.

From 6 March to 12 June 2000 M. O-shvili was under treatment at the Tuberculosis Institute.

From 4 December 2000 to 3 June 2001 M. O-shvili was under treatment at Tuberculosis and Pulmonology Scientific Research Institute, where the next treatment course against tuberculosis was conducted for him and where after controlled examinations the patient was diagnosed with right kidney fibrotic cavernoso tuberculosis (non-functioning kidney), right side buperculosor urethritis, urine tapping tuberculosis, chronicle pyelonephritis, kidney chronicle I-II level shortage, and renovascular hypertension. It was decided to conduct right side nephrectomy.

On 9 March 2001 the patient underwent right side subcapsular nephrectomy (extraction).

On 4 May 2001 a pus running fistula arose because of the right side nephrectomy. M. O-shvili was again referred to the Urology Department of Tbilisi State University Clinic. Immediately after placement at the clinic, the pus running fistula was extracted under intravenous narcosis. On 18 May the patient was discharged from the hospital by undergoing secondary cicatrization and he was assigned ambulatory treatment.

The Chamber considered that since M. O-shvili was diagnosed with testicle tuberculosis he had to be under dispensary supervision and the appropriate treatment should have been attributed. The medical institution was obliged to provide the patient with the information about the diagnosis and anti-tuberculosis treatment necessity. According to the case files it is not established that M. O-shvili was informed about the aforementioned. According to the expert's conclusion, the above mentioned had a negative influence on patient's health and his recovery.

The Chamber considered that the medical institution should have used professional diligence specifically to provide timely information about his diseases to avoid further health deterioration.

The Chamber satisfied M. O-shvili's lawsuit against the medical institution in terms of non pecuniary damage reimbursement.

The Chamber made it clear that the request for pecuniary damage reimbursement is specified neither in the appellate complaint nor in the lawsuit.

According to the cassation rules M. O-shvili appealed the judgment of the Tbilisi Appellate Court Chamber of Civil Affairs of ..June 20.. year by submitting the cassation complaint application.

According to the cassation complaint the applicant in pursuant to Article 413 section 2 of the Civil Code of Georgia claims for 100 000 GEL non pecuniary damage reimbursement. In addition there are provisions for pecuniary damage reimbursement envisioned in the statute: when there is an unlawful act, and the causal relationship between the unlawful act and harm is proved; and the harm doer's fault which is reflected in establishing an incorrect diagnosis is also proved, the applicant can request to impose on respondents the reimbursement of all the expenses spent on treatment and care needed until recently .

Coming from the aforementioned the cassation applicant's request is to void the appealed judgment and deliver the new judgment

Motivation Part:

The Chamber considered case files and the grounds for the cassation complaint and considers that it should not be satisfied for the following reasons:

Pursuant to Article 404 of Civil Procedural Code of Georgia the Cassation Court of Georgia examines the appealed judgment within the framework of a cassation complaint. The Cassation Court cannot on its own initiative examine the procedural violations, except for facts indicated in Article 396 section 1 subparagraph "f".

The Cassation Complaint by its content includes descriptions of M. O-shvili's diseases, there are also the circumstances as established by court that M. O-shvili was operated on in 1991 for testicle tuberculosis, and after this he was not provided with the special anti-tuberculosis therapy until 1996. The mentioned fact had a negative influence on patient's health condition and the effectiveness of his treatment afterward. As the cassation applicant indicates according to Article 413 section 2 of Civil Code of Georgia he requests 100000 GEL for non pecuniary damage

reimbursement. The Appellate Chamber on the basis of the above mentioned norm satisfied the plaintiff's request in the amount of 10000 GEL. The cassation applicant does not indicate why he disagrees with the amount imposed by the court.

The Cassation Court shares the Appellate Court's opinion that the purpose of non pecuniary reimbursement is not the full restitution of the right violated, because the harm incurred does not have an equal amount of money to be reimbursed. At the same time the compensation cannot be determined without boundaries. It is natural M. O-shvili was struck by huge moral ache because of such long and complex disease. But the Appellate Court established only the fault of the Tbilisi State Medical University Clinic Named after Academician Nikoloz Kipshidze and determined the sum of 10 000 GEL. In the Cassation Complaint the founded cassation claim as envisioned by Article 407 of Civil Procedural Code is not presented and neither a factual nor legal basis against the outcome is indicated. There is also no indication about advisability why the respondent should be imposed on the additional sum for pecuniary damage.

The cassation applicant's indication on pecuniary damage does not have a basis for a cassation complaint pursuant to Article 393 of Civil Procedural Code. The Appellate Court explains that neither in the lawsuit nor in the complaint are the expenses paid by the plaintiff indicated. It also cannot be established in the case files. The cassation applicant cannot also contradict this argument. He cannot indicate the basis why the judgment should be void and why the cassation complaint should be satisfied.

Taking into account the aforementioned the Cassation Chamber considers that it is impossible to satisfy the cassation complaint.

According to Article 104, section 1 of the Civil Procedural Code of Georgia, the court will not take into account the evidence from the case files which is not significant for the case.

In the given case citizen of Georgia – Ketevan Chantladze presented an open letter with the enclosed evidences. The Chamber considers that enclosed files on cassation complaint should be taken out from the case files and returned to the cassation applicant, as pursuant to Article 407 of Civil Procedural Code of Georgia the Cassation Court lacks the ability to assess the evidences presented in the first instance court.

Resolution Part:

The Cassation Chamber guided by Article 410 of Civil Procedural Code

Held:

M. O-shvili's Cassation Complaint is no to be satisfied.

The judgment of the Tbilisi Appellate Court, Chamber of Civil Affairs' of ..June 20..year is to be remained unchanged.

The case files (pgs. 592-603) are to be taken out from civil case #as-771-986-08 and returned to the cassation applicant.

The Cassation Chamber's judgment is final and cannot be appealed.